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Brf. of Toole for Def. in Err.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1899.

PATRICK MORAN,
Plaintiff in Error,

vs.

JOSEPH HORSKY, Jr.,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

EDWIN W. TOOLE,
Attorney for Defendant in Error.

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ADDITIONAL FACTS.

It will be seen from the record that, at the trial of this cause, a motion for judgment on the pleadings was made (page 14); and later an amended motion for judgment on the pleadings was made, for the reason, among others, that the defense "is barred on account of the laches of said defendant" (p. 15), and that the motion was granted and judgment rendered accordingly.

The motion for judgment was not made alone upon the

last answer filed, as stated on p. 5 of the brief of plaintiff in error, but was upon the original pleadings which had previously been filed as well as two amended complaints and the two answers thereto. This will appear from the stipulation referred to below. The action had once before been tried, judgment rendered in favor of the plaintiff (defendant in error) upon the ground that the defense was barred by the Statute of Limitations.

The Supreme Court of the State reversed this judgment upon the ground that the statute had not been properly pleaded. Horsky v. Moran, 13 Mont. 250.

The motion for judgment on the pleadings was also based upon the remittitur from the State Supreme Court, which included the opinion of the Court under Rule XIV of the Supreme Court in force at that time, which is as follows:

"XIV.

REMITTITUR, WHEN ISSUED.

"Remittitur will, in cases where it is deemed proper, " be ordered forthwith on determination of appeal; other- " wise the same will be issued on application at any time " fifteen days thereafter, unless motion for re-hearing or " modification of judgment has been made.

"A copy of the opinion will accompany the remittitur " when the judgment or order of the trial court is re- " versed or modified and the case remanded for further " proceedings other than the entry of a final judgment or " order determining the proceedings in the trial court."

Neither the original pleadings nor the remittitur of the Supreme Court have been incorporated in this record, and

were not by counsel for plaintiff in error included in his bill of exceptions used on his appeal to the Supreme Court of the State of Montana; on the second trial in the District Court, that court had the judgment, the former pleadings and the remittitur as a part of its own records; on appeal from the judgment then rendered, it was stipulated that the pleadings in the transcript on the former appeal should be considered as a part of the transcript on the then pending appeal (see p. 35, see also p. 16), and, of course, the Supreme Court of the State had its own record of its decision and judgment.

None of these papers is in this record; it is difficult to see how they could now be made a part of the record, as they are not made a part of the bill ofexceptions or referred to therein, except as to the original complaint (p. 16). The pleadings, other than the original complaint and answer, are in the record. They speak for themselves. The motion was based upon them as an entirety, and counsel for defendant in error prefers not to select isolated portions of them.

Sections 29, 30 and 33, of the Code of Civil Procedure, Compiled Statutes of the State of Montana (which were the laws in force at the time of the trial of this cause, see page 14 of the record, in the motion for judgment) are as follows:

> "Sec. 29. No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained unless it appear that the plaintiff, his ancestor, predecessor, or grantor was seized or pos-

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sessed of the property in question within five years before the commencement of the action.

"Sec. 30. No cause of action or defense to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual unless it appear that the person prosecuting the action, or making the defense, or under whose title the action the action is prosecuted, or the defense is made, or the ancestor, predecessor, or grantor of such person was seized or possessed of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted or defense made.

"Sec. 33. When it appears that the occupant, or those under whom he claims, entered into possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument instrument as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there had been a continued occupation and possession of the property included in such instrument, decree, or judgment, or of some part of the property under such claim, for five years, the property so included is deemed to have been held adversely, except that, when it consists of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract."

ARGUMENT.

NO JURISDICTION.

We respectfully submit that this court has no jurisdiction to hear this case. The motion for judgment on the pleadings, among other reasons, assigned the following: "And for the reason that the same is barred on ac-

count of the laches of said defendant (plaintiff in error), as shown by the papers and proceedings aforesaid." Record, p. 15.

The trial court in disposing of the motion used this language: "The United States * * * and, under the authority of these last cited cases and numerous others, his self confessed laches, wholly unexplained, place him beyond the pale of any equitable relief either directly or indirectly through the intervention of the government." Record, p. 33. And the Supreme ourt of the State, in the decision from which this writ of eror is taken, bases its decision upon the ground of laches and no other, as will appear from the following language: "Although we put our affirmance of the judgment upon the ground of laches, a majority of the Court believe that the decision and reasoning of the trial court is the correct solution of the other questions discussed." Record, p. 38.

This language leaves no room for doubt that a majority of the Court, consisting of the Chief Justice and Associate Hunt, expressly puts its affirmance of the judgment upon the ground of laches, although a majority of the Court, consiting of Associate Justices Hunt and Pigott, concurred in the decision and reasoning of the trial court upon the other questions raised. In such a case there is a long and unbroken line of decisions of this court holding that there is no jurisdiction in the Supreme Court of the United States. In Eustis vs. Bolles, 150 U. S., 361, Mr. Justice Shiras announces the rule as follows:

"It is settled law that, to give this court jurisdic-

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tion of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. Murdock v. Memphis, 20 Wall., 590; Cook County v. Calumet & Chicago Canal Co., 138 U. S., 635.

"It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court willn ot review the judgment."

"In Klinger v. Missouri, 13 Wall. 257, 263, this court, through Mr. Justice Bradley, said: 'The rules which govern the action of this court in cases of this sort are well settled. Where it appears by the record that the judgment of the State court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws, or treaties of the United States, or upon some other independent ground, and it appears that the court did, in fact, base its judgment on such independent ground and not on the law raising the Federal question, this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this court

will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the state court based its judgment on the law raising the Federal question, and this court will then take jurisdiction.'

"In Johnson v. Risk, 137 U. S. 300, the record showed that, in the Supreme Court of Tennessee, two grounds of defense had been urged, one of which involved the construction of the provisions of the Federal bankrupt act of March 2, 1867, and the other the bar of the statute of limitations of the State of Tennessee; and this court held that 'where, in an action pending in a state court, two grounds of defense are interposed, each broad enough to defeat a recovery, and only one of them involves a Federal question, and judgment passes for the defendant, the record must show, in order to justify a writ of error from this court, that the judgment was rested upon the disposition of the Federal question; and if this does not affirmatively appear, the writ of error will be dismissed, unless the defense which does not involve a Federal question is so palpably unfounded that it cannot be presumed to have been entertained by the state court.' "

This opinion is cited with approval in Harrison v. Morton, 171 U. S. p. 47, and Harrison v. Morton, supra. and Bacon v. Texas, 163 U. S. 228, are cited with approval in McQuade v. Trenton, 172 U. S. 640, where the court says:

"We have repeatedly held that even the decision by the state court of a Federal question will not sustain the jurisdiction of this court, if another question not Federal were also raised and decided against the plaintiff in error, and the decision thereof be sufficient, notwithstanding the Federal question, to sustain the judgment."

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This doctrine is quoted and approved in Allen v. So. Pac. Railroad, 173 U. S., 489, in which the court says:

> "Conceding *arguendo* only that the contentions thus advanced wiuld give rise to the Federal questions as claimed, it becomes wholly unnecessary to consider them if it be disclosed by the record that the state court rested its decision upon grounds wholly independent of these contentions, and which grounds are entirely adequate to sustain the judgment rendered by the State court without considering the Federal questions asserted to arise on the record."

From the citations above made to the record, embracing the motion for judgment on the pleadings, decision of the trial court, and of the Supreme Court of the State, it clearly appears beyond contention that a decision of the Federal question was not necessary to a determination of the cause, and that the judgment could have been and was rendered without deciding it.

While we are confident that this proposition is conclusive of this appeal and fatal to plaintiff in error, we submit the following argument in case the court should conclude to further consider the case on its merits.

POINTS.

First. The adverse possession set up by defendant in eror in his last amended complaint herein not being denied, he was entitled to judgment under the former decision of the supreme court of Montana as the law of the case.

Second. That the claim of plaintiff in error to the premises was barred by the adverse possession of defend-

ant in error and the laches of plaintiff in error as shown by the pleadings, on account of which defendant in error was entitled to the judgment rendered upon the motion.

Third. That plaintiff in error is bound by his election in obtaining a deed to said premises from the Probate Judge under the townsite patent, which occasioned this action, and cannot now asert his claim to the same as mineral land, for which reason defendant in error was entitled to the judgment rendered.

Fourth. That the *patent* to the Probate Judge of the townsite was conclusive evidence of the *fact*, under the pleadings in this case, that the premises were non-mineral at the time said patent issued, and therefore authorized the entry of judgment upon said motion.

I.

We shall take up the four propositions relied on in the order stated and briefly present what we have to say upon them.

As will be seen from the pleadings as they stood upon the former trial of the case in the District Court of the State and as they now stand on this appeal, the statute of limitations, if applicable on the former trial, is equally applicable here. Two of the main questions presented, were, whether the adverse possession of respondent of the premises under the townsite patent was valid against appellant's claim to the same as mineral lands, and if so, are the facts constituting adverse possession sufficiently set out in the complaint. The Supreme Court of the

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State on the first appeal held the plea of the statute of limitations to be material but that the facts alleged were insufficient, and reversed the case solely upon that ground. If the Supreme Court of Montana had considered the adverse possession sought to be set up unavailable it would have said so and not discussed the question of the sufficiency of the facts pleaded and remanded the case on that account. It would simply have said that the plea was not available no difference how complete the allegation of facts in support of it and thus disposed of the question. The doctrine announced in the former decision of this court is applicable here, and under it, the undenied adverse possession of respondent entitled him to pudgment, as the *law of the case* .

Clay v. Hoagland, 6 Cal., 685.

Brim v. Jones, 45 Pac , 46.

Table Mt. &c. v. Stranahan, 21 Cal., 548.

Hermann on Est. and Res. Adj., 117, Sec. 115.

It is fundamental that the principles of a decision upon a question of *law* or *fact* in a case are conclusive in that case wherever that principle of law arises, or wherever the same facts exist in all after proceedings. Here the Supreme Court of the State held as a matter of law that the adverse possession as alleged by respondent if well pleaded and established was valid against appellants alleged title to the possession as a mining claim. Apply the principles thus announced in the former trial to the

facts presented in this, and judgment for respondent was properly entered for the reasons above stated.

To meet this fatal condition of affairs plaintiff in error amended his answer and set up the additional fact that defendant in error and others *entered* and *held* said premises under deeds from said Probate Jundge subject to the bona fide rights of miners in existence at that time. While it will be seen that none of the *facts constituting the adverse possession* set out in the complaint are denied, it will be noted that the allegation in the answer refers to the paper title under which respondent held and not the claim he made to the premises constituting his adverse possession.

Now it has uniformly been held that this kind of a reservation in the patent to the Probate Judge as trustee for the occupants of lots is void and that he takes the title free of such reservation. The patent therefore conferred a title as if such reservation had not been contained in it. So it is with the deed through its agent the same principle would obtain. It is absurd to assume that this reservation is void in the patent as to the Probate Judge and not void as to those for whom he holds. It was declared void on account of the beneficiaries for whom he held, and as a protection to the *cestui qui trust* and not the trustee, who could convey no less or greater title than that conferred upon him. This being the case the defendant in error and his predecessors in interest were presumed to know the law, and their alleged adverse possession is consequently in accordance with

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both patent and deed when properly construed. Suppose no such reservation was contained in the patent to the Probate Judge, who, under the laws of the United States, holds for the occupants of the lots and is required under certain conditions to convey to them, and he should insert such a reservation in his deeds in discharge of his trust imposed by law, would any one doubt the invalidity of such a reservation? If the reservation in the patent is void would not the same principle apply? The inevitable conclusion is, that the *facts* constituting the adverse possession not being denied, and the new matter setting up that defendant in error held under a deed with such a reservation, *when legally construed* leaves the material facts of the former trial on all fours with this, and the principles there announced become the law of the case. To express it more pointedly defendant in error alleges that he claimed title exclusive of any other right, and this is just the kind of title the deed to him legally imports.

The land officers were the agents of the government in conveying the title by patent to the Probate Judge, and the law does not declare the patent void but declares the reservation void. The Probate Judge acts as the agent of the government in conveying to the occupants, and upon the same principle the deed is not void but the reservation in it is void. The ultimate object of the law is to confer title upon the beneficiaries under it. Hence, when it is alleged that respondent holds under a deed with such a reservation it is tantamount to saying that he holds under a deed conveying the fee, and this is exactly

in accord with the facts alleged in the complaint. And so it is, the former decision upon the legal question is the law of this case, and we insist upon the adherence to the doctrines which apply under such conditions. We venture the assertion that every owner of a town lot claims according to the legal effect of his deed with the void reservation eliminated just as the respondent does in his complaint

II.

Feeling so thoroughly convinced from an examination of the authorities, and upon principle, that the doctrine of the "law of the case" is conclusive of all that is in this appeal, we respectfully again present the question in this action as to the applicability of the statute of limitations. The allegation of facts constituting the adverse possession by the amended complaint conforms to the former decision of the Court and fully complies with the requirements of the Code of Civil Procedure. Should the Court consider it proper again to review the question *in this case* we respectfully submit the following points and authorities in support of the adverse possession of the respondent and laches of appellant.

It must be conceded that the right of the Probate Judge to the town site patent for the premises in suit depended upon the mineral or non-mineral character of the same, and it cannot be successfully claimed that in issuing the patent the land department had not the power to determine this question and that it was its duty to do

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so. It follows that under such circumstances the rights of the respective parties to a patent depending upon *this* question of *fact*, the patent, when issued, conveyed the legal title to the granted premises. To divest the grantee therefore of this legal title resort must be had to a court of equity, and even there if a recovery could not be had in ejectment no relief would be afforded. But it will be seen from the various pleadings contained in this record and the records on the former trial, which were part of the motion papers, that many years elapsed before plaintiff in error ever attempted to assert his claim to the premises as mining property in the very heart of the capital of the state. His laches under such circumstances preclude him from asserting any equity against the legal title conferred by the patent.

The patent to the Probate Judge is conclusive of all the facts necessary to justify the issuance of it, one of which is the mineral or non-mineral character of the land granted.

Green v. Barker, 66 N. W., 1032.
Drefus v. Badger, 41 Pac., 279. 108 Cal., 58.
Barden v. N. P. R. R. Co., 154 U. S., 288.
Irvine v. Tarbott, 38 Pac., 896. 105 Cal., 237.
Colburn v. Railroad Co., 13 Montana, 476.
Moore v. Railroad Co., 45 Pac., 215, 18 Montana, 290.

This question of fact, so determined, cannot be questioned collaterally and the patent title of defendant in error can only be reached by plaintiff in error by a suit in

equity to declare him a trustee, or by the United States to declare the patent void or limit its operation. In either case the insuperable barrier of the adverse possession of defendant in error and the laches of plaintiff in error would defeat a recovery.

Curtner v. U. S., 149 U. S., 662, 671.

If he had the legal title as he claims his cause of action acrued a quarter of a century ago; and equity will never afford useless and unavailable relief.

Yore v. Murphy, 45 Pac., 217. 18 Montana, 342.

Plaintiff in error does not claim under a patent so as to bring him within the rule that where two patents have been inadvertently issued for the same premises the courts will go behind the patents and inquire into the equities of the parties. He must rid himself of the result of the legal title conveyed by the patent and can do so only by resorting to a suit in equity, in which he would be met with intolerable laches.

III.

We shall briefly consider the third proposition involved in this contention. The doctrine of election is one of universal application, and wherever the facts warrant it the courts uniformally enforce it. It will be noted that plaintiff in error made his application to the Probate Judge for a deed to the premises in controversy on account of his patent to the same as a townsite; that his application was based upon his occupancy of the same as

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a fractional town lot, and that he made the necessary proof and obtained a deed for the premises and that this very deed invited all this litigation. Robert Hamilton, the predecessor in interest, however, of defendant in error, had paid for the fractional lot, and done all that was required of him to obtain a deed prior to the application of plaintiff in error, which deed was afterwards issued to defendant in error. These are undisputed facts. As a free moral agent and independent citizen he (plaintiff in error) had a right to renounce his mineral claim (if he had any) and elect to take under the townsite patent. This was done; and any one competent to transact business for himself was entitled to do so. By his election he caused this action and is bound by the steps thus taken. He cannot obtain a deed as a beneficiary under the townsite and then limit its operation, effect or purpose to matters that would have defeated him in obtaining it. He was at liberty to claim the premises either as a mining claim, bring his action to declare defendant in error a trustee, or renounce his mining claim and claim under the townsite entry; he chose the latter, and must abide by it. This right of election, when once exercised, cannot be defeated by an after thought, which might possibly be more to his advantage. When once made, the party making it is concluded by it. The rights secured by the laws of Congress are inconsistent; plaintiff in error could not get a deed for the premises as a town lot and at the same time get a title to it as a mining claim. In the former case the deed depends upon the

non-mineral character of the land which he concedes when he gets it, and in the latter it depends upon the mineral character of the land which he likewise concedes when he gets it. He cannot gamble in this way in courts of law or equity; he made his election, as he had a right to do, and must stand or fall by the result of it. The doctrine here announced, we take it, is sustained by the decisions of the courts and text-writers so uniformly as not to require citations to support it.

Bishop on Contracts, Sec. 808.

Hermann on Est. and Res. Adj., Sec. 1028 et seq., 1162, 1175.

Again the motion for judgment on the pleadings could well be sustained upon this ground, which does not involve a Federal question.

IV.

Is the patent conclusive of the *fact* sought to be inquired into? Whenever the right to a patent exists under any conceivable state of facts and the patent issues, it is conclusive evidence, in so far as the legal title is concerned, that the state of facts authorizing its issuance exists. There is no conflict in the authorities on this point.

The question as to the mineral or non-mineral character of the land is determined by the non-mineral patent issued therefor, and in the absence of fraud on the part of the grantee that would warrant the United States in setting it aside or support the claim of a third party in

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treating the grantee as a trustee, the legal title must prevail. The United States does not seek to set aside the patent, no claim of fraud in the entry and obtaining of the patent is alleged by which plaintiff in error was prevented from contesting his claim so as to make him a beneficiary and the grantee in the patent a trustee for him, and it necessarily follows that the patent title must be upheld. As stated, if the patent could properly issue under any conceivable state of facts, when issued, it is an adjudication by the land department that the necessary state of facts exists. Whenever this is the case the legal title to the property is conveyed by it. Hence, did the patent determine the mineral or non-mineral character of the land is an important question. If it did, defendant has no claim in law or equity to the premises in controversy. Nowhere does the law except a mining claim out of the townsite patent, but it is excepted out of the grant under the Act of Congress, just as it is out of the grant to the Northern Pacific Railroad Company, making the cases analagous, and Barden v. N. P. R. R. Co., supra, is directly in point. The only instance where an exception of this kind exists is in the case of a patent to a placer claim, when lodes are known to exist at the time of the application, which are excepted out of the *patent*. In all other instances, if the right to a patent depended upon a given state of facts it is for the land department to pass upon them and issue or deny the patent. In so far as the reservation in the patent to the probate judge in favor of bona fide rights of miners is concerned,

it has been decided too often by this court and the Supreme Court of the United States that such provision is a nullity to require further comment; that a similar reservation in deeds of the probate judge, who acts as agent of the United States in transferring the title, is affected with the same infirmity, follows as a necessary sequence, goes without saying. The beneficiary receives precisely the same title vested in the trustee. Can a grant to a mineral claim, which has conditions attached to it, imply more than a grant to the N. P. R. R. Co. where mines are excepted from the *operations* of either? The cases are parallel and the Supreme Court has decided that the patent determines the mineral or non-mineral character of the land. It was claimed in the Barden case that notwithstanding mineral lands were excepted out of the operation of the grant, that the location of the definite line of the road carried with it all such lands as were not known to be mineral. The court, however, held that this was not the law, but that there must be some time in this drama of title when the mineral or non-mineral character of the land is determined, and that such determination was had when a patent issued to one or the other of the parties. The burden of the argument of the plaintiff in error from beginning to end is that as mineral lands are excepted out of the town site act the location of plaintiffs in error secured a grant from the government, and that the issuance of the patent to the city was as to that portion void. So it is in the Barden case, by the location of the definite line of the road the

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grant became fixed, yet there was no adjudication as to the character of the land until the patent issued, as upon this question depended the right of a patent to either. The expression of the statute that no mineral lands shall be included in a townsite is no more forcible than that they shall be excluded from the grant. It expresses the law as it exists in all cases, yet there must be some time and some tribunal under our system of government when and where these rights are adjudicated. If A is the real owner of a piece of land and sues B to recover it, the adjudication one way or the other fixes the right, however erroneous it may be. So it is here. The theory of plaintiff in error is that the trial court should determine the question of the rights of the parties which depend upon the mineral or non-mineral character of the land, while defendant in error claims that the land department settles that question by the issuance of the patent; and this is exactly the point settled in the Barden case. The only real question is, which is the proper tribunal to settle it. And so it is, the patent to the city (with the unlawful exception excluded) is a determination that *at the time* it issued the land was not mineral and that for this reason a title could be acquired by it. We might here add that there is no such averment in the answer of the mineral character of the land as would except it out of the townsite patent or grant to the railroad, either upon a trial in this court or the land office. The averment is, "that the claim contains valuable deposits of gold" as will be seen from the record—page 12—while the

law is, that it must be known "to contain such an amount of minerals as to be valuable for mining purposes."

Dower v. Richards, 151 U. S., 658, 662, and cases there cited.

In this case, however, the Court finding as a fact that the claim was non-mineral, the effect of the patent became immaterial and is not discussed. The answer therefore fails to set up facts sufficient to conlstitute a defense; would be bad on general demurrer, and for the same reason warrant a judgment upon general grounds upon the pleadings.

Sweeney v. Schlessinger, 18 Montana, 326, 45 Pac., 213.

We respectfully call the attention of the Court to the able and convincing argument contained in the opinion of the trial judge and the many authorities therein cited in support of it. Indeed it would seem that nothing could well be added to what is there expressed.

The original complaint in this action was for the determination of the title to a certain lot in the City of Helena, in the County of Lewis and Clarke, State of Montana, which had theretofore been embraced in a United States patent of said premises as a part of the townsite of said city, and to remove a cloud from the title of defendant in error on account of a deed obtained by plaintiff in error from the Probate Judge for the same premises. Both parties claim title to the same premises from a common source, and the contention was confined exclu ively

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to the respective titles acquired under the townsite entry. The defendant in error, as against *this* claim of plaintiff in error, asserted a title by adverse possession, and set up such a *state of facts* as in his opinion supported such title. Judgment was rendered by this Court upon the pleadings; the case was appealed and the controlling question was whether or not the statute of limitations obtained against the claim set up by plaintiff in error. The Supreme Court of the State held the statute of limitations to be applicable, and reversed the case upon the sole ground that the *facts pleaded* did not come up to the requirements of the statute in such case. After the case had been properly remitted to this Court, defendant in error obtained leave to file an amended complaint, so as to conform to the law as defined by the Supreme Court, and to this amended complaint plaintiff in error filed his amended answer, which with the foregoing facts presents the questions upon which this motion depends.

The amended complaint alleges that plaintiff's (defendant in error) grantor, Robert S. Hamilton, received a deed from the Probate Judge for the *locus in quo* in controversy; that said grantor conveyed to him on the 7th day of May, 1874, and that under this deed and claim of title, exclusive of any other right, he entered into the actual occupation of the identical premises claimed by defendant (plaintiff in error); had the same continuously enclosed by a good and substantial fence for twenty-four years last past; that such claim, occupation and possession were open, notorious and hostile, and that the claim

of defendant was barred under the provisions of the statute mentioned. It alleges that Hamilton, the grantor of defendant in error, finding an excess of ground in *measurement* but not according to boundaries, applied to the Probate Judge for a deed therefor, and paid for the same on the 20th of August, 1873, and that plaintiff (defendant in error), as his grantee, received a deed therefor, as will appear by paragraphs IV and V in said amended complaint. It also alleges that defendant (plaintiff in error), obtained and procured from said Probate Judge a deed for the premises in controversy in the manner and form as set forth in the original complaint.

The amended answer does not deny the conveyances to plaintiff (defendant in error), and his grantors, nor any of the facts constituting the adverse possession of defendant in error, but takes issue upon the legal conclusions of ownership and possession. It does not deny the issuance of the townsite patent, or the application of Hamilton, plaintiff's (defendant in error) grantor, to enter the lot in question, or the payment therefor to the Probate Judge on the 20th day of August, 1873, or the execution of the deed to the same to plaintiff (defendant in error) as such grantee. It alleges that defendant (plaintiff in error) obtained a deed to said premises from the Probate Judge for the purpose of further assuring his title to the same, and to obtain possession in order to enable him to prosecute the necessary development work, and admits the recordation thereof; that he claims title and does

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not deny that the same casts a cloud upon whatever title plaintiff (defendant in error) has to the premises.

Aside from these conceded facts, defendant (plaintiff in error) for new matter, and for the first time, and by his amended answer filed on the 2d day of October, 1894, asserts a mining right or title to said premises, under an alleged location made prior to the patent for the town-site, and avers that plaintiff (defendant in error) and other occupants refused to permit him to represent his mining claim, and offers no excuse for not instituting an action for said premises during the quarter of a century last past, nor does he assign any reason for not applying to the Court for leave to represent. He does not deny the improvements put upon the premises, the open and notorious occupation and possession of the same by plaintiff, or the recordation of the title papers therefor, all of which will fully appear by reference to the pleadings and proceedings on file herein.

Three material questions were therefor presented by the motion.

First—Is the title acquired by the defendant (plaintiff in error) under his deed from the Probate Judge inferior to the title of plaintiff, (defendant in error) and is said deed a cloud upon the same?

Second—Does the new matter set up in the amended answer constitute a valid defense in this action?

Third—If it does, is it barred by the laches of the defendant (plaintiff in error) under the doctrines of equity in such cases?

We will consider these propositions in the order named.

I.

In so far as the title acquired by the defendant (plaintiff in error) under his deed from the Probate Judge is concerned, the Supreme Court emphatically declared that the statute of limitations obtained, and that if the facts suported an adverse possession in plaintiff (defendant in error) and his grantors during the period, provided by law, his title was superior to the title of defendant (plaintiff in error).

The plaintiff (defendant in error) set up title by adverse possession and pleaded such facts, as in his opinion, constituted such possession. The case was reversed upon the sole ground that the facts pleaded were insufficient, thereby distinctly recognizing that the statute was applicable and controlling. If inapplicable, the Court would have so said, and the case would have rested upon other issues presented by the pleadings.

See 13 Mont. 250.

The principles of law thus announced by the Supreme Court of the State become the *law of the case*, and are conclusive of title in plaintiff, (defendant in error) if the facts legally constituting adverse possession are properly alleged and not denied.

Hermann on Res. & Estop., 117, Sec. 115.

21 Am. & Eng. Enc. of Law, 129, note 1,184-187.

Board v. N. P. R. R., 24 Wis., 123.

Wilson Ex'r. v. Deen, 121 U. S., 525 bottom 532.

Burlen v. Shannon, 99 Mass., 200. (96 Am. Dec., 733.)

Clary v. Hoagland, 6 Cal., 685.

Kile v. Tubbs, 32 Cal., 332.

Table Mt. Co. v. Stranahan, 21 Cal., 548.

Lesse v. Clark, 20 Cal., 387.

Page v. Fowler, 37 Cal., 100.

Anderson et al. v. Fisk et al., 36 Cal., 625.

a. Besides, as to defendant's (plaintiff in error) title to the premises in controversy under his deed from the Probate Judge, both parties derive title from a common source, and neither can dispute the title of their common grantor.

b. He (plaintiff in error) has pleaded a particular title and is limited to it.

Sedgwick & Waite on Trial of Title to Land, 492.

II.

But above all, the new matter set up in the amended answer constitutes no defense. It presents the simple question of *fact* as to the mineral or non-mineral character of the land. If both parties claimed under the grant from the government before the emanation of the patent, this would be an open question, and a proper question for investigation by this Court. As it is, the patent is conclusive of the fact that the land was non-mineral and subject to conveyance as a townsite.

The patent is not assailed for fraud in its procurement, and the issue sought to be tendered is absolutely frivolous.

See authorities heretofore cited, and especially N. P. R. R. Co. v. Barden, 154 U. S., 288.

a. The reservation of mineral rights in the patent has universally been held void by the courts.

Heath v. Wallace, 138 U. S., 584-585.

Francoeur v. Newhouse, 40 Fed., 618.

Dredge v. Forsythe, 2 Black, 363.

We insist that the doctrine is firmly established that so long as the title of the respective parties rests solely upon the grant under the statute, the question sought to be presented is proper, but that the issuance of the patent to either is a conclusive determination of the character of the land and can only be impeached for fraud or mistake.

III.

The claim of plaintiff in error to the premises as a mining claim, after a quarter of century's occupancy by defendant in error and his grantors, through their deeds from the Probate Judge, under the towssite patent, is stale and barred by the laches of plaintiff in error. He has no standing in a court of equity under such circumstances.

Chandler v. Calumet, etc., 149 U. S., 93.

Curtner v. U. S., 149 U. S., 662.

Twin Lick Co. v. Marbury, 91 U. S., 587.

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Badger v. Badger, 2 Wall., 87.

Pratt v. Cal. Mining Co., 9 Sawyer,————

a. Courts of Equity usually follow the statutes of limitation in determining whether a suit is barred by laches.

Curtner v. U. S., 149 U. S., 662 and 93.

b. The actual, open and notorious possession and improvement of the premises by defendant and his grantor was constructive notice to defendant, which makes his laches the more obnoxious and his claim the more reprehensible.

c. The recordation of the deeds carrying a chain of title from the patent down to plaintiff was also continuous and constructive notice for the last twenty years.

d. The question as to whether the premises were mineral and not subject to the townsite patent, or non-mineral and subject to be conveyed by it, was a question of fact, and the issuance of the townsite patent is conclusive in a *court of law* that the premisies were *non-mineral.*

French v. Fyan, 93 U. S., 169.

Steel v. Smelting Co., 106 U. S., 447.

Smelting Co. v. Kemp, 104 U. S., 636.

N. P. R. R. Co. v. Cannon, 54 Fed. Rep., 252.

Shanklin v. McNamara, 87 Cal., 371.

N. P. R. R. Co. v. Barden, U. S., 154 U. S., 288.

e. The patent conveys the legal title, *if under any state of facts* the department had the power to convey such title.

Sherman v. Buic, 93 U. S., 209.

Earhardt v. Hoagaboom, 115 U. S., 67; 2 Howard, 284.

Having thus determined the question by issuing the patent, it *ipso facto* not only constituted a *claim* or *right* but passed the *legal title* to the patentees which was *in esse* at the *time* the *definite* line of the road was fixed.

United States v. Miner, 114 U. S., 238.

Doll v. Meader, 16 Cal., 294-295.

Doolan v. Carr, 125 U. S., 624.

H. & D. R'y v. Whitney, 132 U. S., 357.

Bagnall v. Broderick, 13 Peters (U. S.), 240, 436.

Lee v. Johnson, 116 U. S., 48.

Ferry v. Street, 11 Pac. Rep., 571.

Aurora Hill Co. v. 85 Mining Co., 34 Fed. Rep. 515, 519.

Smythe v. New Orleans, 34 Fed. Rep. 825.

Shepley v. Cowan, 91 U. S., 330.

Wright v. Roseberry, 121 U. S., 488.

Earhardt v. Hogaboom, 115 U. S., 67.

Cowell v. Lammers, 21 Fed. Rep., 205, 206.

Ferry v. Street, 11 Pac. Rep., 571.

Towsley v. Johnson, 13 Wallace, 72.

Meyendorff v. Frohner, 3 Mont., 273.

This is conclusive evidence of legal title.

Green v. Liter, 8 Cranch., 229.

Bagnall v. Broderick, 13 Peters (U. S.,) 436.

f. The patent in such case being conclusive evidence of such facts in a court of law, the title conveyed by it can only be assailed for fraud or mistake in a court of equity. Hence, the remedy of plaintiff in error if any

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is in a court of equity, making the doctrine of laches applicable.

Johnson v. Towsley, 13 Wallace, 72.

Again these facts all appear from the pleadings and can be reached by demurrer, and consequently under our practice by motion for judgment.

Beach Modern Equity Practice, 258-259.

Besides plaintiff in error could never obtain a patent until the title to the premises conveyed by patent to the Probate Judge is set aside.

Davis v. Weibold, 139 U. S., 528.

The power conferred under the Constitution of making primary disposition of the soil can alone do this.

The Act of Congress fixes the title acquired to a town lot by an occupant at the time of the entry of the townsite. The deed to plaintiff in error was based upon that right, and he cannot limit the purpose of effect of it. The power conferred under the Constitution of making primary disposition of the soil can alone do this, and he must abide the consequences of the election he has made. The claims to placer ground and town lot to the same parcel of land are antagonistic claims, and plaintiff in error was put to his election which he would rely upon. The application for and obtaining of a deed for the same parcel as a town lot *ipso facto*, operated as a relinquishment or abandonment of his claim to it as a placer claim.

There is another view of this case which seems to us absolutely conclusively against the plaintiff in error.

The title acquired by grant and patent to a mining claim and to a town lot under the townsite law and mineral land act are emphatically hostile and inconsistent titles, and, as we have seen in Davis v. Wiebold, when a patent once issues for one, a second patent cannot issue to the same land until the former is set aside or cancelled.

We have seen that the first title emanating from a patent issued by the Land Department, when under any conceivable *state of facts*, it could issue, vests the legal title in the grantee, which can only be impeached for fraud or mistake.

Here defendant (plaintiff in error) under the undisputed facts holds a deed from the Probate Judge, the grantee in the United States Patent, which he himself procured. He has made his election as to the title under which he would rely and cannot curtail or extend the operation or effect to be given to a title acquired under the Acts of Congress whereby the public domain is primarily disposed of under the Constitution of the United States.

He cannot assail the title thus acquired by his own acts on account of fraud or mistake; as, under the uathorities, he must do in order to maintain his claim to it as mineral lands.

He cannot assail it now on account of any mistake in law, as it is a well settled principle that where a party occasions such a mistake he cannot himself take advantage of it. He accepted the patent or deed under it.

McGuire v. Tyler, 8 Wallace, 650.

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Hence it is, if his title under the townsite patent is vulnerable, he is not in a situation to avail himself of it and he must stand or fall upon the title thus acquired.

Now let us suppose that there was no infirmity in his title to the premises as a town lot, and that the Probate Judge entered it in trust for him, and that the conveyance made by the Probate Judge to the grantors of defendant in error conveyed no title, and that the statute of limitations did not apply or run in favor of defendant in error, then we find ourselves confronted by the decisions of the Supreme Court in this very action that the statute does obtain, which decision however erroneous it may be, becomes the *law of the case* and controls it throughout all of its subsequent stages and proceedings. The decision of the Supreme Court, however, is clearly right. The title having passed from the government, against which no laches is attributable, and the statute in such case running against the title of the beneficiary, and the entry under the void deed to defendant in error, if void, being sufficient to put the statute in motion, if the facts satisfying the statute exist, a title was acquired, and such a title as would support this action. This is precisely what the Supreme Court decided on the former trial. This principle, thus declared, was made controlling, and the case was reversed for the reason that in the opinion of the Supreme Court the facts constituting the adverse possession under the statute did not appear to exist. Here they are well pleaded and are admitted, and the law thus announced becomes the *law of the case*. On Dec. 11, 1888,

the defendant (plaintiff in error) elected to obtain a title to the *locus in quo* from the United States through the patent to the townsite of the City of Helena, and he must now be regarded as having relinquished and renounced his irreconcilable claim to it as mining ground. The case is not at all analogous to the purchase of outstanding titles, as generally understood as the acquisition of one title, or in other words a non-mineral title defeats the acquisition of a mineral title until the former is set aside.

Ordinarily if A purchased of B and C he obtains both titles, while under the law here he must set aside or impeach the one first obtained before any could be acquired from the other; and under such condition of things he is in pari delicto, cannot impeach for fraud, and is the author of any mistake or error there may be in law, and is not in a situation to take advantage of it. And so it is where a party is not entitled to both, i. e., a mineral and non-mineral title, he must be deemed to have elected, when he obtains either the one or the other. It is binding on the party making it, and he cannot thereafter pursue an inconsistent course, and avail himself of an inconsistent claim. The defendant (plaintiff in error) under the Acts of Congress could assert a claim to either, perhaps, but not to both. It is the intention of the United States, the grantor, to convey under one or the other, and not both. Defendant (plaintiff in error) chose to assert his claim under the grant to the townsite, and it is too late now to assert a claim to it under the mineral act. By his unequivocal action he has elected

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to take a deed under the townsite patent, and the law establishes the consequences of his act. It is not left to implication or uncertainty so as to be controlled *if it could be* by intent, but is express and unequivocal, and as matter of law must be deemed conclusive. The grant was not made to the Probate Judge by the United States nor by the Probate Judge to defendant (plaintiff in error) for the purposes of enabling him to work a mining claim or for any other purpose than that named in the grant, and plaintiff in error cannot take it otherwise. The patent, while in existence, shuts out the question he seeks to litigate.

The right to elect includes also the duty to elect, and imposes all the consequences of an election when it is made. Here it is especially so, as the government cannot issue a patent for the land as mineral, and also for the same land as non-mineral. The defendant (plaintiff in error) shows from his answer that he was an occupant as an inhabitant of the townsite, at the time of the entry, and also held a mining claim upon the same premises. He was therefore in a situation to renounce or abandon his mining claim, and claim and obtain title as non-mineral land under the townsite patent. He has done so, and cannot now obtain a patent for it as mineral land, and there is no title to such lands recognized when a right to a patent ceases.

It will be noted that it is also claimed on the part of defendant in error that whenever a question of *fact* determined the question as to *whom* should receive the

patent, it became the duty of the officers of the land office to determine that fact under proceedings first instituted in the land department; that whenever it issues a patent that it was a judicial determination that the lands were of the character designated by the patent. That the first and only proceeding to obtain a patent was under the townsite laws, and that the issuance of a patent therefor was a determination that the land was non-mineral, and that the patent pased the legal title to the grantee therein, which could only be assailed by direct proceedings or suit in chancery; and that the right to a mining claim before payment for it, or issuance of patent, was a bare possessory claim, subject to be defeated by a failure to comply with the law, and in no sense was it a "fee simple title;" and that this was the character of title here arrayed against the patent, without presenting any grounds in a court of chancery for its impeachment; that it was the policy of the government to settle such facts as to the non-mineral or mineral character of the land by the patent; and that a reservation of a mining right in a non-mineral patent, or a non-mineral right in a mineral patent was for that reason void. Upon these propositions many authorities have been cited, and especially the more recent decisions of the Supreme Court of the United States, which are controlling on these questions. None of the exceptions in grants of homesteads, pre-emptions, townsites, railroads, etc., contain provisions similar to those contained in the entry of placer claims where the grantee by his patent under the statute is deemed to exclude all

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known lodes. But the rule is different where both patents are for mineral lands, and the land office is not called upon to pass on the questions—as it is, when called upon to pass on the mineral and non-mineral character of the land, and the patent on *its face* shows that it is either for one or the other—counsel refers especially to Iron Silver Co. v. Campbell, 135 U. S. supra, and the last case, N. P. R. R. Co. v. Barden, 154 U. S. supra, as conclusive of all these questions.

We again call the attention of the Court to them, and refer to the case of South End. Min'g. v. Tinney, 38 Pac. Rep. 401, et seq.

We respectfully submit that the naked question as to the mineral or non-mineral character of the land is conclusive against the claim of defendant by the non-mineral patent. That his claim, if any he has, can only be enforced in a Court of Chancery by proper averments, and that it is barred by his laches.

Respectfully submitted,

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